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FEDERAL COMMUNICATIONS COMMISSION
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James P. Riley, Esq.
Fletcher, Heald & Hildreth, P.L.C.
11th Floor, 1300 North 17th Street
Rosslyn, VA 22209-3801

In re: NEW(FM), Pollock Pines, CA
American Educational Broadcasting
BPED-960118MM

Dear Mr. Riley:

This letter is in reference to American Educational Broadcasting's (American's) application for a new noncommercial educational FM station on Channel 210A in Pollock Pines, California.¹ For the reasons stated below, the application will be returned.

American's application would create, for the first time, a new "hole" of prohibited contour overlap within the 60 dBu protected contour of third-adjacent channel station KKTO (formerly KXKB), Tahoe City, California. American's application requests that 47 C.F.R. Section 73.509 be waived to permit this new contour overlap, noting that the area of overlap which would be created by the new station's 100 dBu interfering contour would be only 0.03 % of KKTO's authorized 60 dBu service contour. In the application it is stated that mountains, which are higher than KKTO's antenna height, separate the proposed FM station from KKTO and that the proposed station is located at the edge of KKTO's 60 dBu contour. Therefore, American believes that actual interference to KKTO's 60 dBu contour would not exist. Consequently, American believes that waiver of Section 73.509 is justified in this instance because the benefits of a new educational FM station would be in the public interest and would outweigh the minimal possibility of interference to third adjacent channel Station KKTO.

We do not agree. While requests for waivers of second and third adjacent channel overlap for new stations are individually appealing due to the relatively large area and population served as compared to the small area and population receiving prohibited contour overlap (and hence interference), they lose this appeal when considered against the Commission's allocations scheme for noncommercial educational FM stations. Allowing new proposals to create contour overlap effectively nullifies the protection to a noncommercial educational FM station's 60 dBu protected service area as mandated by Section 73.509. Specifically, the

¹ This proposal is mutually exclusive with four other applications for new stations: BPED-951113MB, Reno, Nevada; BPED-960118MH, Reno, Nevada; BPED- 960118MH, Hawthorne, Nevada; and BPED-950718MA, Tahoe City, California. The Tahoe City application was placed on an "A" cut-off list with a cut-off date of January 18, 1996.

affected station would lose service area and population served without receiving any benefit in return.² This interference would interrupt the continuity of service provided by the affected station (KKTO) throughout its protected service area, and thus diminish the quality of FM service from the afflicted station. Over time, the grant of numerous similar waivers would degrade the quality of existing FM reception throughout the entire noncommercial educational FM band.

Section 73.509 is not only intended to prevent interference; it is a Commission vehicle for ensuring a fair distribution of noncommercial education FM service throughout the country, as mandated by Section 307(b) of the Communications Act. We emphasize that a cautious approach to interference protection is warranted because the authorization of full-service noncommercial educational FM stations is premised on a Section 307(b) determination that such a station in a particular community would promote the "fair, efficient, and equitable distribution of radio services...." A station's obligation to serve listeners throughout its service area, the overall integrity of the FM band and the special statutory protections which full service permittees and licensees enjoy, *see* 47 U.S.C. Section 316, require that the Commission strictly enforce its technical requirements.

As stated above, American believes that actual interference to KKTO's 60 dBu contour would not exist because mountains separate the proposed FM station from KKTO. However, the provisions in the Rules governing contour protection (and avoidance of overlap) between noncommercial educational stations (47 C.F.R. Section 73.509) do not include a provision for terrain shielding. The Commission has not provided for the use of supplemental showings in determining the extent of interfering or protected contours between noncommercial educational stations in the reserved portion of the FM band. *Letter to Douglas, L. Neibauer, Esquire and Todd D. Gray, Esquire, (Ref. 8920-JR), dated 20 FEB 1991.*

We note that the area of interference and public interest factors presented here, in support of the request for waiver of the rule, are generally true for all applicants for new stations who seek waiver of the rule for second and third adjacent channel contour overlap caused to another station and are not unique to American's proposal. Section 73.509 requirements are the foundation mechanism which the Commission uses to protect the integrity of FM non-commercial educational station licensees. In these circumstances we decline to depart from our strict enforcement policy. Moreover, we note that the proposed waiver would have far-reaching impact on our licensing policies. As a result, we cannot find that grant of American's request for waiver of Section 73.509 would outweigh the benefits conferred by adherence to the rule.

When an applicant seeks waiver of the rules, it must plead with particularity the facts and circumstances which warrant such action. *Columbia Communications Corp. v. FCC*, 832 F.2d

² Contrast that with the situation of WCPE, Raleigh, NC in *Educational Information Corporation*, 6 FCC Rcd 2207 (1991), wherein WCPE agreed to accept a small amount of interference received in exchange for a large increase in its 60 dBu service area.

189, 192 (D.C. Cir. 1987) (quoting *Rio Grand Family Radio Fellowship, INC. v. FCC*, 406 F.2d 644, 666 (D.C. Cir. 1968) (per curiam)). We have afforded American's waiver request the "hard look" called for under the *WAIT* Doctrine, *WAIT Radio v. FCC*, 418 F2d 1153 (D.C. Cir. 1969), but find that the facts and circumstances set forth in the justification are insufficient to establish that granting waiver of 47 C.F.R. Section 73.509 would be in the public interest. Consequently, the application's request for a waiver of 47 C.F.R. Section 73.509 IS HEREBY DENIED, and Application BPED-960111MM IS HEREBY RETURNED as unacceptable for filing.

In the Public Notice entitled *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, FCC 84-366, released August 2, 1984, the Commission indicated that it would reinstate applications *nunc pro tunc* where the original application was dismissed and where a relatively minor curative amendment was filed in conjunction with a petition for reconsideration within 30 days of the date of the dismissal. Any amendment filed later than 30 days will be returned as untimely. See 47 U.S.C. Section 405, 47 C.F.R. Section 1.106(f). In this regard, it should be emphasized that the above deficiency was discerned after a preliminary study of the application. A detailed review was not made of the entire application to determine whether other deficiencies exist which would preclude acceptance for filing or result in a subsequent dismissal. Inasmuch as the applicant will *not* be afforded a second opportunity to correct another deficiency, I would urge that the applicant carefully review the entire application.

Sincerely,

Dennis Williams

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Mass Media Bureau

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cc: Ms. Linda Adams
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American Educational Broadcasting